предусматривать тесты, но сможет ли тест отличить коррупционера от не коррупционера – вопрос сомнительный. По мнению экспертов, после этой процедуры немало преступников смогут остаться на должности. Возможность освобождения судьи от должности за нарушение присяги, если он не прошел переаттестацию, – Венецианская комиссия сделала замечание по этому поводу, говоря, что это положение нужно подкрепить изменениями в Конституцию.

Высший совет юстиции должен играть решающую роль в обеспечении независимости судебной системы, поэтому крайне важно, чтобы ни одна политическая организация не имела достаточного количества рычагов воздействия на нее.

Выводы. Отметим, что изменения являются шагом вперед для Украины, по сравнению с предыдущей системой судебной власти. Поправки к законодательству о судебной системе в Украине показывают серьезность намерений Президента Украины по ограничению полномочий Президента и, кроме того, говорят о его серьезном отношении к реформе коррупционной судебной системы.

Список использованной литературы:

1. Уровень доверия украинцев к судам составляет почти 40%: исследование. – [Электронный ресурс]. – Режим доступа : http://censor.net.ua/news/322536/uroven_doveriya_ukraintsev_k_sudam_sostavlyaet_pochti_40_issledovanie.

2. Про судоустрій і статус суддів : Закон України від 07.07.2010 № 2453-VI // Відомості Верховної Ради України (ВВР). – 2010. – № 41 /№ 41–42; № 43; № 44–45 /. – 1468 с. – Ст. 529.

3. Про забезпечення права на справедливий суд : Закон України від 12.02.2015 № 192-VIII // Відомості Верховної Ради України (ВВР). – 2015. – № 18, № 19–20. – 1054 с. – Ст. 132 / 1010 с. – Ст. 132.

4. Пропозиції Реанімаційного пакету реформ до законопроекту, підготовленого робочою групою з питань правосуддя та суміжних правових інститутів Конституційної комісії. – [Електронний ресурс]. – Режим доступу: http://www.rpr.org.ua/ua/groups-rpr/judicial-reform.

NON-APPLICATION OF SAFEGUARD MEASURES TO DEVELOPING COUNTRIES

Nataliia KOVALCHUK,
postgraduate, V.M. Koretskyi Institute of State and Law, NAS of Ukraine

Аннотация

В статье анализируются положения Соглашения ВТО о защитных мерах, предусматривающие неприменение защитных мер к развивающимся странам; проводится сравнительное изучение применения членами ВТО, в том числе Украиной, этих положений на практике; и делается вывод о необходимости усовершенствования нормативно-правовой базы Украины и практики применения защитных мер с целью обеспечения соблюдения обязательств по Соглашению ВТО.

Ключевые слова: ВТО, защитные меры, развивающиеся страны.

Summary

The paper analyses provisions of WTO Agreement on Safeguards envisaging non-application of safeguard measures to developing countries; conducts a comparative study of practical application of these provisions by WTO members, including Ukraine; and concludes that Ukraine's legal framework, as well as its practice in application of safeguard measures, should be improved to ensure compliance with its obligations under WTO Agreement.

Key words: WTO, safeguard measures, developing countries.

A problem statement. Unlike overwhelming majority of WTO members, Ukraine initiates safeguard investigations and applies safeguard measures relatively frequently that requires compliance with provisions of WTO Agreement on Safeguards (SGA), which specifically oblige WTO members to exclude developing countries from the measures.

Relevance of research topic is determined by lack of comparative studies on this issue, as well as by recent conclusions of Panel in Ukraine – Passenger Cars, which found that Ukraine's measures were inconsistent with ten provisions of WTO agreements.

Exclusion of developing countries from safeguard measures has been studied in works by Y.S. Lee, P.C. Mavroidis, F. Piérola, A.O. Sykes, M.J. Trebilcock, J.M. Wauters and others.

The purpose of this paper is to analyse provisions of SGA stipulating for non-application of safeguard measures to developing countries, and their interpretations by WTO Panels and Appellate Body (AB); to conduct a comparative study on practical application of these provisions by WTO members, including Ukraine; and to make recommendations on improvement of Ukraine's relevant legal framework.

The results of study. Ukraine is among few WTO members, which continue to invoke provisions of Article XIX of GATT 1994 and SGA relatively often. Under GATT developed countries (Australia, Canada, EU and US) were leading users of safeguard measures. Nowadays, developing country members, primarily India, Indonesia and Turkey followed by Ukraine, are most frequent users of safeguards [1].

As of 25 October 2015 safeguard investigations were being conducted and/or safeguard measures were applied by only 20 WTO members from South America (3), Africa (5), Asia (9), Ukraine, as well as Armenia and Russia (the EAEU measures), and over two measures were applied by Indonesia (7), Turkey (6), India (3), Philippines (3) and Thailand (3) [2, p. 12−15]. After having revoked safeguard measures on imports of passenger cars since 30 September 2015, now Ukraine applies 2 measures and is conducting 1 investigation [2, p. 14−15].

Unlike anti-dumping and countervailing measures, which are intended to offset unfair trade practices, safeguard measures must be applied on an MFN basis. Pursuant to SGA Article 2.2 safeguard measures must be applied to all imports irrespective of their source [3, p. 275]. From an economic standpoint, non-discriminatory application of safeguard measures prevents trade diversion, i. e. replacement of more «efficient imports» by imports from less efficient producers in third countries excluded from measures [4, p. 63].

However, pursuant to SGA Article 9.1 safeguard measures must not be applied against products originating in a developing member as long as its share of imports of products concerned in importing member does not exceed 3%, provided that developing Members with less than 3% import share collectively account for not more than 9% of total imports of products concerned [3, p. 279−280]. Article 21 of Ukraine's Law «On Application of Special Measures to Imports into Ukraine» contains a similar provision [5].

Although deviation from MFN requirement prescribed in Article 2.2 occurs when measures are imposed in form of quotas (SGA Article 5), and in case of quite questionable exemption of partners under regional trade agreements, Article 9.1 is exception that not only allows, but also obliges WTO members to exclude certain countries from measures.

Until now compliance of safeguard measures with SGA Article 9.1 has been scrutinized in only two cases: US − Line Pipe and Dominican Republic − Safeguard Measures. In both cases respondents' measures were found inconsistent with provisions of this Article.

In particular, in US − Line Pipe AB concluded that respondent had not taken «all reasonable steps that it could and, thus, should have taken» to exclude developing countries exporting less than de minimis levels in Article 9.1 from measure [6, p. 44].

Besides, in this case AB did not uphold Panel's conclusion that Article 9.1 requires explicit exclusion of developing countries. The AB agreed with US that Article 9.1 does not indicate how a member must comply with this obligation, and emphasized that «there is nothing… in text of Article 9.1 to effect that countries to which measure will not apply must be expressly excluded from measure». Furthermore, AB agreed with respondent that it is possible to comply with Article 9.1 «without providing a specific list of Members that are either included in, or excluded from, measure». It further stated that «although such a list could, and would, be both useful and helpful by providing transparency for benefit of all Members concerned, we see nothing in Article 9.1 that mandates one» [6, p. 43].

Therefore, WTO members may comply with provisions of Article 9.1 by establishing some criteria that ensure automatic exemption of developing countries from a safeguard measure.

F. Piérola reasonably argues in this regard that such approach may be risky because if actual compliance is conditioned on performance of market and expected behavior of imports, there is no guarantee that such compliance would happen at all [7, p. 289].

In Dominican Republic − Safeguard Measures Panel emphasized that WTO members, which apply safeguard measures, «are obliged to adopt all reasonable measures available to them» to exclude all developing countries that meet criteria in SGA Article 9.1 [8, p. 118].

Having pointed to insufficiency of respondent's assertion that Thailand was de facto excluded from measure, Panel concluded that measure was inconsistent with obligations under SGA Article 9.1, because Dominican Republic had failed to exempt Thailand from measure, which accounted for 0,32% of total imports [8, p. 119−120].

On basis of this conclusion, Y.S. Lee notes that WTO members are not allowed to exclude developing members selectively from application of de minimis rule under Article 9.1 [9 p. 175].

Besides, in this case Panel concluded that parallelism principle (a strict correspondence between imports investigated under SGA Articles 2.1 and 4.2 and imports subject to a safeguard measure under SGA Article 2.2) does not apply to imports from developing countries excluded from measure pursuant to Article 9.1.

The Panel notes that Article 9.1 obliges a WTO member to exclude from application of safeguard measure a share of imports from developing members that fulfill conditions set out in Article 9.1, even when these imports have been taken into account in substantive analysis during investigation [8, p. 116].

Therefore, Panel concluded that respondent acted consistently with its obligations under SGA Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 as regards parallelism principle, by failing to conduct a new analysis to determine increase in imports, injury and causal link, excluding imports from developing countries exempted from measure under Article 9.1 [8, p. 118].

Until then, on basis of conclusion in paragraph 472 of AB's Report in US − Steel Safeguards [10, p. 156−157], some authors believed that parallelism rule applied to imports from countries to be excluded from measures under Article 9.1 [11, p. 489−490].

However, these authors acknowledged that application of parallelism principle to imports from developing countries was not in line with AB's conclusion in US − Line Pipe that there is no need to explicitly exclude such countries from safeguard measures. Specifically, it is not possible to comply with parallelism requirement without explicitly excluding imports from developing countries and examining whether remaining imports, which are subject to measure, per se, fulfill conditions for imposition of a safeguard measure [11, p. 490].

On whole, one may agree with these authors' conclusion that SGA has certain shortcomings and AB's jurisprudence has not contributed much to rectifying these shortcomings, and on certain occasions it has confused matters even further [11, p. 577].

Pursuant to footnote 2 to Article 9 a WTO member must immediately notify an action taken under Article 9.1 to Committee on Safeguards [3, p. 280]. According to format approved by Committee, notifications under Article 9.2 specify, inter alia, developing countries exempted from measure under Article 9.1, import shares of these countries individually and collectively, and changes in list of such countries [12, p. 4]. All these notifications are accessible to public through WTO Documents Online database [13].

Despite AB's conclusions in US − Line Pipe, WTO members, including Ukraine, provide, as a rule, «positive» lists of developing countries excluded from measures, as prescribed in notification's format. However, notifications of some WTO members specify only developing countries, which are not excluded from safeguard measures. In case of EAEU members and India this approach may be explained by existence of approved lists of developing countries for purposes of SGA Article 9.1.

Analysis of notifications under Article 9, footnote 2 has shown that

unlike other countries, which generally exclude over 100 WTO members from their measures, Ukraine does not apply its safeguard measures only to products originating in about 30 least developed WTO members.

This approach seems erroneous taking into account provisions of WTO agreements, and practical application of SGA Article 9.1 by other WTO members.

Least developed countries are just a separate group forming part of broader category of «developing countries» as set out in preamble to WTO Agreement [3, p. 4]. Article V of WTO Revised Agreement on Government Procurement provides that special and differential treatment is accorded to «least developed countries» and «any other developing country», and these countries are collectively referred to as «developing countries» [14].

In response to Egypt's question regarding Ukraine's compliance with provisions of SGA Article 9.1 Ukraine contends that there is neither a definition of «developing country» in WTO nor any established convention in that respect in UN system, and reasonably maintains that «self-designation» does not entail an automatic acceptance by other WTO members [15].

Indeed, as V. Avgoustidi and S. Ballschmiede point out, absence of an explicitly defined notion of «developing country» in WTO agreements creates a certain degree of legal uncertainty, and may undermine general objective of SGA Article 9.1, which is to grant effective special and differential treatment to developing countries [16, p. 365].

In US − Steel Safeguards China raised issues related to developing country status for purposes of Article 9.1, but having found that US measures were inconsistent with several SGA provisions, Panel exercised «judicial economy» and did not consider China's claim under Article 9.1 [17, p. 934].

Therefore, at present WTO members may establish their own eligibility criteria for exclusion under Article 9.1, and it can hardly be expected that in near future WTO members can reach a consensus on a clear definition of term «developing country» or a precise list of developing countries.

Analysis of notifications, submitted by India, Indonesia, Philippines, Russia and Turkey, has shown that all WTO members from Africa (43), Latin America and Caribbean (32) and Oceania (6, encl. Australia and New Zealand), and 24 out of 36 (excl. Japan) members from Asia are treated by all these members as developing countries for purposes of Article 9.1.

However, there are certain differences in treatment of some WTO members from Asia and Europe for purposes of SGA Article 9.1. Specifically, having designated China, Hong Kong (China), Republic of Korea, Singapore and Turkey as developing countries, Russia does not consider Chinese Taipei, Georgia, Israel, Macao (China), Moldova and Ukraine as such. All WTO members from Europe (6, excl. EU and EFTA Members) are treated as developing countries by Turkey, but this WTO member does not exclude Hong Kong (China), Singapore and Chinese Taipei, as well as Armenia from its measures. Indonesia and Philippines exempt «new» EU Members (Bulgaria, Lithuania, Romania etc) and Israel from their safeguard measures.

Thus, despite lack of a clearly defined notion of «developing country» and universally accepted list of such countries, WTO members, which are active users of safeguard measures, consider practically all WTO members as developing countries for purposes of Article 9.1, except for countries, which are commonly recognized as developed countries: Australia, Canada, Iceland, Japan, New Zealand, Norway, Switzerland, US and Member States of EU.

As mentioned above, some countries and separate customs territories have approved lists of developing countries for purposes of Article 9.1. In 1993−1997 Ukraine also had a similar list of 145 developing countries whose certain products were subject to preferential rates of customs duties [18].

The EAEU's legislation provides for non-application of safeguard measures to products originating in developing and least developed countries, which

Table

Exclusion of developing countries under Article 9.1

Member	Product	Year of introduction	Number of exclusions	
			Total	WTO Members
India	Saturated fatty alcohols	2014	132	107
	Sodium citrate	2015	134	109
Indonesia	Bars and rods	2015	121	121
	Coated paper and paperboard	2015	118	118
Philippines	Newsprint	2015	201	135
	Testliner board	2011	198	132
Russia (EAEU)	Tableware and kitchenware of porcelain	2013	151	114
	Harvesters	2014	151	114
Turkey	Wallpaper	2015	143	109
	Polyethylene terephthalate	2011 2014 (extension)	137	103
Ukraine	Tableware and kitchenware of porcelain	2014	34	34
	Motor cars	2013	31	31

are beneficiaries of the union's system of tariff preferences, on condition that imports from these countries do not exceed thresholds established in Article 9.1 [19, p. 9]. The customs union has approved lists of developing and least developed countries, which comprise 104 and 48 countries respectively [20].

Pursuant to Protocol on customs union's common system of tariff preferences [21] list of developing countries includes countries, which are not classified as high-income economies by World Bank (WB). However, a qualifying country may not be included in list or may be excluded from it if this country: reaches income level defined as high by WB; takes unfriendly actions; has serious drawbacks in drugs export and transit control; does not comply with international anti-money laundering treaties; and if this country's import volumes of five largest commodity groups in two previous years amount to or exceed 75% of total imports of these goods from countries benefiting from system.

Despite these criteria, at present EAEU's list of developing countries includes 25 countries and customs territories[1] being classified as high-income economies by WB [22].

Achieving «high-income economy» status under WB's classification is criterion for mandatory exclusion from list of beneficiary countries under US Generalized System of Preferences [23, p. 351], used by this country also for purposes of Article, and EU Generalized Scheme of Preferences [24, p. 5]. Besides, footnote 1 to Article 43 of Ukraine-EU Association Agreement provides that for purposes of SGA Article 9 determination of developing country shall take into consideration lists issued by international organizations such as WB, OECD or IMF, etc [25].

Thus, WB's classification can be deemed acceptable and objective basis for drawing-up list of developing countries for purposes of Article 9.1.

It is obvious that exclusion of developing countries from safeguard measures creates opportunities for new suppliers to enter market, and these new entrants can and in practice gain a considerable market share in absence of competition from more efficient exporters subject to measures.

Some WTO members deal with this issue by imposing safeguard measures against such countries following appropriate reviews. Certain WTO members (Costa Rica, Indonesia, Philippines) expressly specify in their notifications that lists of developing countries exempted from safeguard measures may be amended if import volumes change.

Some authors note that it is an open question whether developing countries originally excluded from application of a safeguard measure (on basis of having a market share of less than 3 per cent) and whose import volumes grow subsequently on account of trade diversion can become subject to such measures at a later time [4, p. 120, endnote 55].

However, SGA Article 9.1 rather unambiguously requires WTO members do not apply safeguard measures to products originating in such countries «as long as» their individual share does not exceed 3% of total imports.

From an economic standpoint, continued non-application of safeguard measures to countries, originally exempted from measures and whose share subsequently exceeded 3%, creates unfair conditions for developing countries, to which such measures were initially applied.

Analysis of notifications shows that following relevant reviews lists of developing countries have been amended by Argentina, Brazil, India, Jordan, Philippines and US.

For example, having imposed safeguard measures on certain steel products in 2002 and having excluded 99 developing WTO members from measures US President instructed Trade Representative to review, on a quarterly basis, data on imports of products from countries exempted from measures, and authorized USTR to change list of developing countries to which safeguard measures do not apply, if increase in imports of products from such countries undermines effectiveness of safeguard measure [26].

Philippine Tariff Commission's reports specify that relevant reviews are conducted annually by Department of Trade and Industry. For example, report on safeguard action against import of testliner board states that Department draws up a list of developing countries exempt from measure for 2011 and conducts an annual review of imports of testliner board and draws up appropriate exemption lists for following years [27].

For instance, following annual review in 2012 Philippines excluded China, Chinese Taipei and Singapore from list of countries exempted from measures against imports of testliner board, and in 2014 – Saudi Arabia whose imports amounted to almost 71% of total imports in 1st quarter of 2013.

Having imposed safeguard measures on imports of dried coconuts in 2002 and exempted products originating in 91 developing countries from measures, Brazil subsequently excluded Côte d'Ivoire, Indonesia, Malaysia and Philippines from list. It should be noted that since introduction of measure shares of Indonesia and Philippines reached 59,5% (September−November 2002) and 46,2% (December 2004 – February 2005) in total imports of product respectively.

Therefore, further exemption of goods originating in a developing country whose share has exceeded 3% is not in line with SGA Article 9.1, which provides for non-application «as long as» threshold has not been exceeded. Furthermore, such exclusion lacks economic sense.

Conclusion. Based on study findings and in order to ensure compliance with SGA Article 9.1 it is advisable to approve a list of developing countries, which could be based on World Bank's country classification, or to authorize a relevant body to draw up such list, and to legislate regular reviews providing for application of safeguard measures to products originating in developing countries whose import volumes have exceeded de minimis level.

References:

1. Statistics on safeguard measures. – [Electronic resource] / WTO. – Mode of access : https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm#statistics.

[1] Antigua and Barbuda, Argentina, Aruba, Qatar, Hong Kong (China), Bahamas, Saudi Arabia, Bahrain, Seychelles, Barbados, Singapore, Bermuda, Brunei Darussalam, Korea, Rep., Cayman Islands, Kuwait, St. Kitts and Nevis, Trinidad and Tobago, Chile, United Arab Emirates, Oman, Turks and Caicos Islands, Uruguay, Croatia, Venezuela.

2. Report (2015) of Committee on Safeguards to Council for Trade in Goods (document G/L/1130-G/SG/141, 28 October 2015).

3. The Results of Uruguay Round of Multilateral Trade Negotiations: The Legal Texts / WTO Secretariat. – Geneva: WTO Publications, 2002. – 492 p.

4. World Trade Report 2009. Trade Policy Commitments and Contingency Measures / WTO. – Geneva: WTO Publications, 2009. – 172 p.

5. Закон України «Про застосування спеціальних заходів щодо імпорту в Україну» від 22 грудня 1998 року № 332-XIV. – [Electronic resource] / Верховна Рада України. – Mode of access : http://zakon0.rada.gov.ua/laws/show/332-14.

6. Report of Appellate Body, US – Line Pipe. – [Electronic resource] / WTO. – Mode of access : https://www.wto.org/english/tratop_e/dispu_e/202abr_e.pdf.

7. Piérola F. The Challenge of Safeguards in WTO / Fernando Piérola. – Cambridge: Cambridge University Press, 2014. – 416 p.

8. Final Report of Panel, Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric. – [Electronic resource] / WTO. – Mode of access: https://www.wto.org/english/tratop_e/dispu_e/415_416_417_418r_e.pdf.

9. Lee Y.-Sh. Safeguard Measures in World Trade: The Legal Analysis, Third Edition / Yong-Shik Lee. – Cheltenham, Northampton: Edward Elgar Publishing, 2014. – 416 p.

10. Report of Appellate Body, US – Steel Safeguards. – [Electronic resource] / WTO. – Mode of access: https://www.wto.org/english/tratop_e/dispu_e/248_259_abr_e.pdf.

11. Mavroidis P. The Law and Economics of Contingent Protection in WTO / Petros C. Mavroidis, Patrick A. Messerlin, Jasper M. Wauters. – Cheltenham, Northampton: Edward Elgar Publishing, 2008. – 606 p.

12. Formats for Certain Notifications under Agreement on Safeguards (document G/SG/1/Rev.1-G/SG/N/6/Rev.1-G/SG/89, 5 November 2009).

13. Notifications. Article 9, Footnote 2. – [Electronic resource] / WTO. – Mode of access : https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_009.aspx?TopLevel=7326#/.

14. Revised Agreement on Government Procurement. – [Electronic resource] / WTO. – Mode of access : https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

15. Replies to Questions Posed by Egypt Regarding Notification of Ukraine (document G/SG/Q2/UKR/2, 29 April 2015).

16. Wolfrum R. WTO – Trade Remedies / Rüdiger Wolfrum, Peter-Tobias Stoll and Michael Köbele. – Leiden, Boston: Martinus Nijhoff Publishers, 2008. – 980 p.

17. Final Reports of Panel, US – Steel Safeguards. – [Electronic resource] / EU. – Mode of access : http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114441.pdf.

18. Додаток 1 до Єдиного митного тарифу України, затвердженого Декретом Кабінету Міністрів України від 11.01.93 № 4-93 «Про Єдиний митний тариф України».

19. Протокол о применении специальных защитных, антидемпинговых и компенсационных мер по отношению к третьим странам. – М.: РГ-Пресс, 2015. – 84 p.

20. О едином таможенно-тарифном регулировании Таможенного союза Республики Беларусь, Республики Казахстан и Российской Федерации. – [Electronic resource] / EAEU. – Mode of access : http://eec.eaeunion.org/ru/act/trade/catr/ttr/Pages/preferences.aspx.

21. Протокол о единой системе таможенных преференций Таможенного союза. – [Electronic resource] / EAEU. – Mode of access : http://www.eurasiancommission.org/ru/act/trade/catr/ttr/Documents/P%20ESTP.pdf.

22. High-income economies. – [Electronic resource] / World Bank. – Mode of access : http://data.worldbank.org/about/country-and-lending-groups#High_income.

23. United States Code. 2012 Edition. Vol. 13. – Washington: U.S. Government Printing Office, 2013. − 1233 p.

24. Regulation (EU) № 978/2012 of European Parliament and of Council of 25 October 2012 // Official Journal. – 2012. – L 303. − P. 1−82.

25. Association Agreement between European Union and its Member States, of one part, and Ukraine, of other part // Official Journal. – 2014. – L 161. – P. 3–2137.

26. Memorandum on Action Under Section 203 of Trade Act of 1974 Concerning Certain Steel Products // US Federal Register. – 2002. – Vol. 67. – № 45. – P. 10593−10597.

27. Formal Investigation of Safeguard Measure Case Against Importation of Testliner Boards from Various Countries. – [Electronic resource] / Philippine Tariff Commission. – Mode of access : http://www.tariffcommission.gov.ph/safeguard-final-reports.